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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. _____

Little Rock, Newspapers, Inc. ..... *Petitioner*

v.

Louis Art Dodrill. ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Little Rock Newspapers, Inc., Petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above case on July 2, 1979, which reversed its own judgment in the same case that had been entered on April 30, 1979, and reversed the decision of the trial court granting summary judgment for Petitioner.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Arkansas are reported at 265 Ark. 628, _____ S.W.2d _____ (1979). The opinions of April 30, 1979, and the opinions of July 2, 1979, both bear the beginning page number of 628 in volume 265 of the Arkansas Reports. Although the April 30, 1979, opinions appear in the Advance Sheets, they will not appear in the official reports, and the July 2, 1979, opinions will be substituted therefor. All opinions are reprinted in an Appendix to this Petition.

JURISDICTION

The judgment of the Supreme Court of Arkansas was made and entered on July 2, 1979. A timely petition for rehearing was filed on July 19, 1979 and denied on September 10, 1979. The Supreme Court of Arkansas granted petitioner's motion to stay issuance of the mandate to the Circuit Court of Pulaski County and to stay further proceedings in the Supreme Court of Arkansas and the Circuit Court of Pulaski County pending the filing of a petition for writ of certiorari in this Court and final determination by this Court. The jurisdiction of this Court to review the judgment below is conferred by 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

(1) Whether a disbarred attorney is a public figure for the limited range of issues surrounding his

attempts to gain readmission to the bar, and (2) whether the insistence of the Arkansas Supreme Court that a person must thrust himself into public controversy in order to become a public figure is an unconstitutionally narrow interpretation of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

STATEMENT

The Arkansas Supreme Court Committee on Professional Conduct filed suit against the Respondent, Louis Art Dodrill, charging him with violating the Model Code of Professional Responsibility of the American Bar Association as adopted by *per curiam* order of the Arkansas Supreme Court and ARK. STATS. ANN. Sec. 25-401 (Repl. 1962), which provides for the suspension or removal from practice of an attorney under certain conditions. After a trial on the merits, the trial court, on February 4, 1975, found violations of the Code and of the Statute, and suspended Respondent's license to practice law for a period of twelve months, the license to be reinstated only upon Respondent's satisfactorily passing the regular examination for admission to the bar administered by the State Board of Bar Examiners. Respondent did not file a timely appeal, but he later filed a petition in the Arkansas Supreme Court challenging the trial court's power to require him to take the bar examination. The Arkansas Supreme Court dismissed the petition. *In re Dodrill*, 260 Ark. 223, 538 S.W.2d 549 (1976). Respondent took the bar

examination and, on August 21, 1976, the Board of Bar Examiners, in accordance with long-standing practice, announced the names of applicants who had passed the examination and furnished the list to the major newspapers, including the *Arkansas Democrat*, which is published by Petitioner. Respondent's name was not on the list.

On August 22, 1976, the *Arkansas Democrat* published an article which stated in part as follows:

SUSPENDED LR LAWYER FAILS BAR EXAMINATION

> Louis Arthur Dodrill, a Little Rock lawyer whose license was suspended for a year on February 4, 1975, for unethical conduct in his dealings with four clients, failed to pass the August examination of the State Board of Bar Examiners.

Respondent filed a petition for a writ of mandamus in the trial court seeking an order directing the State Board of Bar Examiners to report his scores on the bar examination. The Board of Bar Examiners moved to dismiss the petition. The fact of the petition was reported by the *Arkansas Democrat* on October 27, 1976, and the article stated that Respondent's name had not been published along with the list of successful examinees. Respondent was unsuccessful in his efforts to obtain a writ of mandamus.

Respondent then filed suit in federal court against the members of the Board of Bar Examiners for injunctive and other relief.

On May 14, 1977, the Board of Bar Examiners certified Respondent to be licensed. In the instant case, affidavits and other materials established that Respondent had scored a passing grade on the bar examination, and that the delay in certifying him for readmission was because the Board of Bar Examiners was continuing its investigation to determine whether Respondent met other requirements for a license.

After he had regained his license to practice, Respondent filed suit against Petitioner, charging that he was libeled by the two articles referred to above that appeared in the *Arkansas Democrat*. The trial court granted Petitioner's motion for summary judgment, holding, *inter alia*, that Respondent was a public figure at the time of the publication of the allegedly defamatory articles and, further, that there was no evidence of malice on the part of Petitioner in publishing the articles. A-41. Respondent perfected an appeal to the Arkansas Supreme Court, which, on April 30, 1979, held in an opinion endorsed by four of the Arkansas Supreme Court's seven members that Respondent was a public figure and that the decision of the trial court should be affirmed. A-1. Following a petition for rehearing, the Arkansas Supreme Court reversed itself by a four to three majority and, in a substituted opinion filed on July 2,

1979, held that Respondent was not a public figure. [1] A-24. Petitioner raised the privilege of the First Amendment to the Constitution of the United States in the first pleading that it filed in this case (Separate Answer of Little Rock Newspapers, Inc. to the Amended and Substituted Complaint) and it has reasserted the federal question at every stage of these proceedings.

The full court was in agreement that there is no evidence of malice in this case. The standard of liability for libel cases involving private individuals was established as negligence. Petitioner does not question that holding. The only issues in this petition are whether Respondent was a public figure at the time the allegedly defamatory articles were published and whether the substituted majority opinion establishes an unconstitutionally narrow definition of "public figure."

REASONS FOR GRANTING THE WRIT

1. To preserve the broadest freedom of reporting with regard to disciplinary proceedings involving lawyers.

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1. The substituted majority opinion was written by a Special Justice, a practicing lawyer who was appointed by the Chief Justice to serve on this case in place of an Associate Justice who had recused himself.

In Arkansas, the Supreme Court, which is the state's highest appellate court, is charged with regulating the professional conduct of attorneys at law. ARK. CONST. AMEND. NO. 28. Grounds for removal or suspension of attorneys are specified in ARK STATS. ANN. Sec. 25-401 (1962 Repl.). Pursuant to this authority, the Supreme Court Committee on Professional Conduct brought suit against Respondent. The trial court, which sat as a trier of fact, entered judgment suspending Respondent's license for one year and conditioning his readmission to the bar upon his successfully passing the state's bar examination. The newspaper articles that gave rise to this action for libel concerned Respondent's efforts to gain readmission to the bar. Although all lawyers are not public officials or public figures, the public's interest in a lawyer against whom charges of misconduct have been proved and who has been suspended from practice is sufficient, under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) and its progeny, to elevate that person to the status of a public figure for the limited range of issues surrounding his efforts to gain readmission to the bar. The public controversy over the qualifications (or lack thereof) of lawyers adequately to represent clients predictably and properly results in the light of public attention being focused on the disbarred lawyer who seeks to regain his license. The public controversy over the handling of grievances against lawyers requires that persons subjected to discipline be treated as public figures for

the purpose of reassuring the public at large that it is protected against the unscrupulous and the incompetent at the bar. [2]

This is not a case of a lawyer representing a private litigant, as in *Gertz v. Robert Welch, Inc., supra.* It is not a case of a litigant in a private personal matter such as the divorce in *Time, Inc. v. Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1975). It is not a case of a private individual voluntarily choosing not to appear before an official inquiry, knowing that his refusal might result in publicity, as in *Wolson v. Reader's Digest Ass'n., Inc.,* _____ U.S. _____, 99 S.Ct. 2701, _____ L.Ed.2d _____ (1979). It is not a case of a private individual who became the subject of public attention only as a result of the alleged libel, as in *Hutchinson v. Proxmire,* _____ U.S. _____, 99 S.Ct. 2675, _____ L.Ed.2d _____ (1979). Respondent was an officer of the court, licensed by the state's highest court, and suspended because of his conduct. His trial was a matter of public record and the subject of newspaper articles. His petition to the Arkansas Supreme Court challenging the trial court's authority to require him to take the bar examination was reported in the press. The acts that resulted in the

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2.

"The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court . . . . The power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation by courts that a man who is allowed to hold himself out to practice before them is in 'good standing' so to do." Mr. Justice Frankfurter in *Theard v. United States,* 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957).

charges against him by the Supreme Court Committee on Professional Conduct made him a public figure for a limited purpose.

2. To correct the unconstitutionally narrow interpretation of "public figure" as applied by the majority of the Arkansas Supreme Court.

The Arkansas Supreme Court held that "public figures" under the rule in *Gertz* are "persons in whom the public has a *continuing interest* in that in each instance the individual had taken affirmative steps to attract public attention or had strived to achieve some sort of public acclaim." Substituted majority opinion, A-31 (emphasis supplied).

The ruling of the Arkansas Court ignores the concept recognized in *Gertz* that an individual may be *drawn* into a particular public controversy and thereby become a public figure for a limited range of issues. *Gertz v. Robert Welch, Inc., supra* at 351.

Respondent drew public attention to himself because of the violation of the trust of four separate clients which resulted in his suspension from the bar. Respondent had not taken steps deliberately to attract public attention. He surely would have preferred no

attention at all. [3] The ruling of the Arkansas Supreme Court would accord "public figure" status to a person who attempts to influence public events by voluntarily injecting himself into the debate on the training and qualifications of lawyers or on the handling of grievances against lawyers, but would deny it to the person whose actions are of the type that generate the controversy and debate in the first place. This interpretation of *Gertz* and the First Amendment to the Constitution of the United States is impermissibly narrow. As Associate Justice Hickman pointed out in the substituted dissenting opinion in this case:

> "Finally, and most importantly, the effect of the majority's decision is to limit the First Amendment to the Constitution of the United States." Substituted dissenting opinion, A-40.

This Court should grant this petition to correct the error of the Arkansas Supreme Court.

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3. "Public figure status does not hinge upon an individual's preference in the matter." *Bandelin v. Pietsch*, 98 Idaho 337, 563 P.2d 395 (1977), holding that an attorney became a public figure when he was accused by the district court of mismanaging an estate of which he was court-appointed guardian. *Bendelin* holds that a person may be drawn involuntarily into a controversy.

CONCLUSION

This case presents the Court with an opportunity to assure the public that the standards of the legal profession and the disciplining of lawyers can be scrutinized by the media with a national standard of liability rather than a standard that varies from state-to-state. The restrictive view of the majority opinion of the Arkansas Supreme Court that a disbarred lawyer is not a public figure for the limited range of issues surrounding his efforts to gain readmission to the bar will have a potentially chilling effect upon the reporting of events surrounding matters of pervasive current debate and controversy, i.e., the qualifications of lawyers and the handling of disciplinary proceedings involving lawyers.

This case also permits the Court to correct the unconstitutionally narrow definition of "public figure" adopted by the Arkansas Supreme Court which rejects the proposition that an individual may become a public figure by being drawn into a public controversy.

The issues in this case are ripe for review by this Court under the principles announced in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), which treated the decision of the highest court of a state on the federal issue as a final judgment for the purposes of 28 U.S.C. Sec. 1257 and took jurisdiction without awaiting the completion of additional proceedings anticipated in the lower state courts. Specifically, the Arkansas Supreme

Court's holding that Respondent had not gained the status of a "public figure" is not subject to further review in the Arkansas courts, and the federal issue could become moot if Respondent fails to prove negligence on the part of Petitioner in publishing the allegedly defamatory articles. Petitioner must file this petition at this time or it may waive its right to seek review of the constitutional question at a later time. *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 30-32, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961).

For the foregoing reasons, this petition for a writ of certiorari should be granted.

December 5, 1979.

Respectfully submitted,

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APPENDIX

ORIGINAL OPINION OF ARKANSAS SUPREME COURT

SUPREME COURT OF ARKANSAS
No. 78-10

Opinion Delivered Apr. 30, 1979

LOUIS ART DODRILL,	Appellant,	Appeal from Pulaski Circuit Court; Warren E. Wood; Circuit Judge.
V.		
ARKANSAS DEMOCRAT COMPANY, ET AL,	Appellees.	Affirmed.

DARRELL HICKMAN, *Associate Justice*

Louis Art Dodrill, a Little Rock lawyer, sued the company which owns the Arkansas Democrat, a Little Rock newspaper with statewide coverage, for libel and invasion of privacy.

The Pulaski County Circuit Court granted the Democrat summary judgment dismissing Dodrill's complaint. Dodrill appeals alleging two errors. First, he argues that the court acted improperly regarding the libel action because Dodrill was not a public figure

and, therefore, Dodrill had to prove only negligence and not actual malice. Second, he argues that the court improperly granted summary judgment on the invasion of privacy claim. We conclude the trial judge was correct in granting summary judgment. The material facts regarding Dodrill's status and proof of malice are not disputed.

Dodrill was sued by the Supreme Court Committee on Professional Conduct in the Pulaski County Circuit Court for professional misconduct. On February 4, 1975, Pulaski County Circuit Judge Tom Digby entered a judgment finding that Dodrill had in four separate instances violated Ark. Stat. Ann. §25-401 (Repl. 1962) and the Code of Professional Responsibility which has been adopted by this Court. See, Per Curiam, 260 Ark. 910 (1976). These four violations involved commingling and personal use of a client's funds; endorsing the names of co-payees on a check and cashing it without their knowledge or consent; deceiving a client regarding disposition of funds obtained in settlement of a case; and, again, commingling a client's funds and a violation of Canon 9 of the Code of Professional Responsibility. His misconduct, while not intentionally fraudulent, was determined by Judge Digby to be unethical. The judge ordered that Dodrill's license to practice law be suspended for a period of 12 months. Also, the order provided that reinstatement was conditioned on Dodrill again passing the regular bar examination. Dodrill did not appeal from this decision.

Later, Dodrill filed a petition in this court questioning the circuit court's authority to condition his reinstatement at the end of 12 months on his passing the regular bar examination. We dismissed that petition finding that the circuit court had the power to impose such a condition. *In re: Dodrill*, 260 Ark. 223, 538 S.W.2d 549 (1976).

Dodrill took the bar examination administered in August, 1976. The Board of Bar Examiners announced on the 21st of August, 1976, those who had passed the examination and provided a list to the Arkansas Democrat and the Arkansas Gazette. Dodrill's name was not on this list. Customarily only those who pass are named.

In the August 22, 1976, Sunday issue of the Arkansas Democrat the following article appeared:

SUSPENDED LAWYER
FAILS BAR EXAMINATION

Louis Arthur Dodrill, a Little Rock lawyer whose license was suspended for a year on Feb. 4, 1975, for unethical conduct in his dealings with four clients, failed to pass the August examination of the state Board of Bar Examiners.

Dodrill's name was not on the list of applicants who successfully completed the examination. A spokesman for the law firm of McArthur, Johnson, Lofton, Wilson & Jacobs, which represented Dodrill in an appeal to the

state Supreme Court, said Dodrill took the examination.

Dodrill could not be reached Saturday night for comment.

Dodrill appealed Digby's ruling, but the Supreme Court in July rejected Dodrill's petition, which sought to have the court declare he could be reinstated to practice law without complying with the circuit court stipulation.

The charges of professional misconduct were brought by the Supreme Court Committee on Professional Conduct, a group of lawyers appointed by the Supreme Court.

After the article was published, Dodrill filed a petition for a writ of mandamus in the Pulaski County Circuit Court asking that the State Board of Bar Examiners be required to report his test scores. The Board filed a motion to dismiss Dodrill's complaint.

On October 27, 1976, the Democrat wrote another article:

EXAM BOARD LAWYER
ASKS SUIT DISMISSAL

Robert L. Rogers, II, a lawyer for the state Board of Law Examiners, has filed a motion in Pulaski Circuit Court asking Circuit Judge Tom F. Digby to dismiss a lawsuit filed by a suspended lawyer who wants to know his score on the Aug. 9 state bar examination.

Louis Art Dodrill of 3000 Maryland Avenue filed the suit Oct. 5 asking Digby to force the state board to make public his score and to order the board to inform him whether he passed the examination.

Dodrill did not appear at a hearing in the case last week, and Rogers' motion was the latest maneuver in a long controversy that dates back to Feb. 18, 1975.

Digby ruled on that date that Dodrill's license to practice law would be suspended for one year because of unethical conduct in his dealings with four clients. The judge said Dodrill's license couldn't be reinstated until he passed the exam again.

Dodrill missed the deadline for appealing Digby's ruling to the state Supreme Court, and the Supreme Court ruled on July 12 that the appeal had not been lodged in time.

Dodrill then filed suit against the bar group seeking to determine his score.

When the results of the Aug. 9 bar examination were made public, only those who passed the examination were listed. As a rule, the law examiners do not mention those who fail.

Dodrill, having obtained no satisfaction in his state mandamus suit, filed another lawsuit against the members of the Board of Bar Examiners in the United States District Court seeking injunctive relief and alleging, among other things, that the members of the

Board were responsible for the first article published in the Democrat.

The evidence before the trial court consisted of the memorandum opinion and judgment entered by Judge Digby regarding Dodrill's suspension, three affidavits by employees of the Democrat, and other pleadings.

It is undisputed that the first article was in error because Dodrill had not failed to pass the bar examination. His name had been omitted from the list because the State Board of Law Examiners had not completed its investigation of Dodrill's moral and mental qualifications as required by the rules concerning admission to the bar.

It is also undisputed that there was no malicious intent on the part of any reporter, employee or agent of the Democrat in causing the error to be printed. Several employees of the Democrat filed affidavits, including the reporters concerned and an editor, that they had no malice towards Dodrill. Dodrill responded to the motion for summary judgment and offered no proof of malice on the part of the Democrat or any of its employees or agents. He did offer some proof which disputed the Democrat's claim that it was not negligent.

Dodrill's complaint about the second article published on October 27th was that it was libelous because it incorrectly said he had failed to appear at a

court hearing, and that the article held him up to contempt, disgrace and ridicule. The Democrat offered the same proof of a lack of malice regarding the second article and Dodrill's response was identical to the first, i.e., he had no evidence of malice.

The controlling question regarding the libel complaint is whether Dodrill was a "public figure." If he was, then the trial court was correct because, according to the law, the Democrat would be protected from a libel suit regarding its reporting Dodrill's conduct or circumstances because there was no evidence of malice. Malice is knowledge that the publication was false or published with reckless disregard of whether it was false or not. *Gallman v. Carnes, et al*, 254 Ark. 987, 497 S.W.2d 47 (1973). This protection extended to the Democrat even though the publications were mistaken or false—which they were in part.

Protection afforded by the First Amendment of the United States Constitution regarding publications has been the subject of several recent United States Supreme Court cases. Generally, a greater degree of protection under the First Amendment is afforded in

defamation suits when there is publication regarding public officials or public figures. [1] In *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the court granted constitutional privilege for defamatory falsehoods concerning "a public official" about a "matter of the highest public interest and general concern." In *Rosenbloom v. Metromedia*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), the court extended its decision in *Sullivan* to include First Amendment protection to one reporting an event of public or general concern that involved a private individual. The *Rosenbloom* opinion was by a plurality and not a majority of the justices. Later a majority of

1.

The reasons the United States Constitution is deemed to afford a degree of protection to members of the media are numerous. One explanation was given by Justice Brennan in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) at page 279, wherein he said:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, e.g., *Post Publishing Co. v. Hallam*, 59 F. 530, 540 (C.A. 6th Cir. 1893); see also Noel, Defamation of Public Officers and Candidates, 49 Col. L.Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser v. Randall*, supra, 357 U.S., at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

the Supreme Court of the United States rejected the formula of subject matter used in *Rosenbloom* and decided that the character of the individual, rather than the subject matter, should determine the extent of constitutional protection afforded to publications. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the court held that constitutional protection would only extend to publications regarding individuals who were public officials, had become public figures, or were public figures for a limited range of issues. In other words, the individual, rather than the subject matter, was the controlling factor. Since Dodrill was not a public official, we will omit any reference to that category of individuals.

Public figures are defined in *Gertz* at page 345:

> . . . Those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

One may become a public figure in various ways:

> . . . In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in

> all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.
>
> *Gertz, supra*, at 351.

In *Gertz*, the court held that Gertz, a lawyer, had not become a public figure. He had achieved no general fame or notoriety in the community and his reported activities that involved his participation related solely to the representation of a private client.

In a later decision, *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1975), the United States Supreme Court continued its use of the *Gertz* formula. In *Firestone*, it was found that Mary Alice Firestone, a prominent socialite, and the scion of one of America's wealthier industrial families, had not become a public figure. Time, a weekly newspaper magazine, reported erroneously regarding a divorce action in which Firestone was a party. The court recognized, at page 457, that:

> . . . while participants in litigation may be legitimate "public figures," either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent [Firestone], drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others.

In summary, the United States Supreme Court has to a degree given the individual more protection from false publications.

We addressed this problem after the *Sullivan* and *Rosenbloom* cases, but before the *Gertz* and *Firestone* cases, in *Gallman v. Carnes, supra*. In *Gallman*, we found that an assistant professor at the University of Arkansas Law School was a "public official" and publication about Gallman involved matters of public or general concern. In deciding *Gallman*, we used the guidelines laid down in the *Sullivan* and *Rosenbloom* cases. We recognized in *Gallman* that publication regarding such individuals was only actionable if proof of actual malice existed. We adhere to that standard of liability which is left to each state to determine. *Gertz v. Welch, supra*, at 347. In *Gallman*, we adopted a reasonable, rather than a restrictive, application of the definitions set forth by the United States Supreme Court in *Sullivan* and *Rosenbloom*. Using the same reasonable application to definitions propounded in *Gertz* and *Time*, we conclude that Dodrill had, in fact, become a public figure for at least a limited purpose.

Dodrill was a licensed attorney, privileged only as a licensed attorney is, to represent anyone, in any cause, before any court in this state. He was granted this privilege to hold in trust, people's money, their secrets, and their property; he was entrusted to plead their cause, whether involving their property or, more importantly, their liberty, before any court. A

correlative of such a privilege is the power to bring before the bar any individual, entity or corporation to answer for alleged misconduct. While such power may be insignificant in the minds of many, it is not to those who have been victims of a frivolous or a vindictive lawsuit.

Dodrill had been granted this power and responsibility by the State of Arkansas and subsequently lost it when his license to practice law was suspended for a period of 12 months by the Circuit Court of Pulaski County. The court found that Dodrill had in four separate instances violated Ark. Stat. Ann. §25-401 (Repl. 1962) and the Code of Professional Responsibility of the American Bar Association.

Dodrill was not a lawyer involved in a situation regarding a private client, as was lawyer Gertz; he was not drawn into a public forum to settle a personal and private matter, as was Ms. Firstone. Dodrill was not just *any* fledgling law graduate seeking a license to practice law. He was seeking restoration of his license which had been suspended for unethical conduct. He was in court and in the public eye because of his own professional misconduct involving a breach of public trust, and to that extent he was a "public figure."

Since it is undisputed the Democrat had no malice towards Dodrill, and since he had become a public figure for a limited purpose, the trial court was right in granting summary judgment to the Democrat.

Dodrill's complaint for invasion of privacy was also properly dismissed.

We recognized the right to a cause of action for invasion of privacy in *Olin Mills, Inc. v. Dodd*, 234 Ark. 495, 353 S.W.2d 22 (1962).

The Restatement (Second) of Torts §652A (1977) enumerates the acts which give rise to such a cause of action:

> (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
>
> (2) The right of privacy is invaded by
>
> (a) unreasonable intrusion upon the seclusion of another . . .
>
> (b) appropriation of the other's name or likeness . . .
>
> (c) unreasonable publicity given to the other's private life . . .
>
> (d) Publicity that unreasonably places the other in a false light before the public . . .

Restatement (Second) of Torts §652E (1977) places two conditions on the recovery for such an action as that filed by Dodrill:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Dodrill argues on appeal that he made two claims for invasion of his privacy. One would be under the category defined in Restatement (Second) of Torts §652A (2)(c), and the other defined in §652A (2)(d).

The trial judge found that there was no evidence of malice and that the articles complained of concerned matters of public and general concern. We agree with those findings.

The United States Supreme Court, in *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967), decided that to sustain a cause of action for invasion of privacy regarding a matter of public interest or concern it must be shown that actual malice rather than mere negligence was the cause of the published falsehood.

The decision in the *Hill* case is not affected, in our judgment, by the *Gertz* or *Firestone* decisions. The cause of action for libel in those cases was treated differently than a cause of action for invasion of privacy. See *Gertz v. Welch*, supra, at 335.

There was clearly no evidence that the Arkansas Democrat published the two articles in question with any knowledge that the articles were false or in reckless disregard of the truth. Also, it is clear that the publications were regarding matters of general or public concern, for the reasons we have stated.

Consequently, since there were no genuine issues of material fact with regard to the invasion of privacy claim, we affirm the summary judgment entered by the trial court.

Affirmed.

Harris, C.J., Special Justice Hardin, and Byrd, J. dissent.

Fogelman, J., not participating.

ORIGINAL DISSENTING OPINION

SUPREME COURT OF ARKANSAS

No. 78-10

Opinion Delivered 4/30/79

LOUIS ART DODRILL,
APPELLANT — Appeal from Pulaski Circuit Court, Warren E. Wood, Circuit Judge

vs.

ARKANSAS DEMOCRAT COMPANY, ET AL.
APPELLEES — Dissent

P. H. HARDIN, Special Justice

DISSENTING

In affirming the summary judgment in favor of the *Arkansas Democrat*, the majority has found appellant, Dodrill, a "public figure" because he was seeking restoration of a license which had been suspended for unethical conduct and that he was in court, and in the "public eye", because of his own professional misconduct involving a breach of public trust. The most alarming aspect of the majority opinion is that it is henceforth a precedent for holding that *any* lawyer is a public figure, and is therefore, effectively, powerless to redress defamatory

falsehoods published about him. By extension it could be said that any individual who is licensed to practice any profession or engage in any calling is *ipso facto* a public figure. In reaching this conclusion, I am of the opinion that the majority misapplies the definition of "public figure" as announced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

In *Gertz*, the Court noted that public figures usually enjoy significantly greater access to channels of effective communication than private individuals. The Court reasoned that private individuals were more vulnerable because of their lack of a forum to rebut false statements and that they were more deserving of recovery because they had not thrust themselves into the vortex of public controversy. The Court defined "public figures" as individuals who

> have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. *Id.* 345.

The definition of "public figure" is quite broad and, indeed, one may be held a public figure for limited purposes. Various courts have held included within the

defintion, for limited purposes, a football coach, [1] political activitist, [2] wife of nationally known television celebrity, [3] editor of newspaper, [4] and a belly dancer. [5] The classification of "public figure" in these instances was justified by the particular facts of those cases. While all of the individuals who have been held to be public figures have not taken active parts in debates on public issues, they nevertheless remained persons in whom the public had a continuing interest because in each instance the individual had taken affirmative steps to attract public attention or had strived to achieve some degree of public acclaim.

The majority interprets *Gertz* as concluding that the extent of First Amendment protection is to be determined by the "character of the individual rather than the subject matter". What the Court did say was

> It is preferable to reduce the public-figure question to a more meaningful context by

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1.
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

2.
Associated Press v. Walker, 388 U.S. 130 (1967).

3.
Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976).

4.
Tait v. King Broadcasting Co., 1 Wash. App. 250, 460 P.2d 307 (1969).

5.
James v. Gannett Co., Inc., 40 N.Y.2d 415, 353 N.E.2d 834 (1976).

> looking to the nature and the extent of an individual's participation in the particular controversy giving rise to the defamation. *Id.* 352.

Gertz was a licensed attorney who for years had been active in professional and community affairs. He had served as an officer of numerous civic groups and of various professional organizations. He had published several books and articles on legal subjects, but nevertheless, the Court concluded that he had not achieved general fame or notoriety in the community. Clear evidence is the standard for determination of "general fame or notoriety" and absent such clear evidence the inquiry is narrowed to the individual's participation in the particular public controversy.

Gertz was a private individual with the same public trust, as the majority points out, with which all lawyers are entrusted. Nevertheless, the Court found in a highly publicized case that Gertz did not thrust himself into the vortex of the public issue, nor did he engage the public's attention in an attempt to influence its outcome. He neither discussed the issues involved with the press nor did the press ever quote him on such issues. Clearly, if Gertz was not a public figure under the facts before the Supreme Court of the United States, Dodrill cannot be under the facts in the record before us.

Mrs. Firestone was not first brought to the public's attention by the defamation that was the subject of the suit. The Court rejected the publisher's contention that Mrs. Firestone was a public figure even though it appears from the Court's opinion, both majority and dissent, that she was a fairly publicized individual. She had been prominent among the "400" of Palm Beach, Florida, society and had been an active participant of the "sporting set". Her seventeen month trial ordeal had attracted national news coverage and had resulted in no fewer than forty-three articles in the Miami newspaper and forty-five in the Palm Beach newspapers. Mrs. Firestone did not shun publicity. In fact, she *invited* it by holding several press conferences during the course of the proceedings. Her interest in the publicity she received was evidenced by her subscription to a press-clipping service. Moreover, she had instituted as the plaintiff a separate maintenance action which initiated the events resulting in the divorce decree. Thus, Mrs. Firestone was not drawn into the litigation, but had been the party responsible for instituting it.

The Court, in dealing with the publisher's contention that the Firestone divorce had been characterized by the Florida Supreme Court as a "cause celebre" and that it was a public controversy, observed:

> But in so doing Petitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this

> reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom* . . . which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. *Id.* 454.

The Court further observed that Mrs. Firestone did not freely choose to publicize the issues by voluntarily invoking the judicial process to seek separate maintenance. "We have said that in such an instance '[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.' " *Id.* 454. The Court further found that Mrs. Firestone had not assumed special prominence in the resolution of public questions and, therefore, held that she was not a public figure.

A fair interpretation of the *Firestone* Court's holding is that the institution of an action in court involving matters of general public interest does not elevate the participants to the status of public figures. The voluntary or involuntary action of one instituting private litigation is no test for the determination of the public figure issue. Clearly, Gertz voluntarily undertook to defend a client in what appears to have been a highly publicized event. He was free to have declined such employment. Mrs. Firestone, as a matter of choice, voluntarily instituted an action for separate maintenance. The important element is that neither Gertz nor Mrs. Firestone thrust themselves into the

vortex of a public issue. Neither of them engaged the public's attention in an attempt to influence the outcome of the public issues.

The record in the case at bar is devoid of facts supporting the lower court's finding that Dodrill had attained "public figure" status. He had not thrust himself into the vortex of public controversy or issue and, in fact, any showing of a public controversy was absent. Moreover, he neither had taken steps to attract public attention, nor had he strived to achieve a degree of public acclaim. His activities were restricted to complying with the lawful mandate of the circuit court by applying for and taking the regular bar examination in August, 1976, an event in which the names of the applicants were not released for public dissemination. [6] Whether he passed or failed would no more elevate him to "public figure" status than did the representation of a client in a highly emotional and publicized case elevate Gertz to "public figure" status, or than did the widely publicized activities elevate the celebrated Mrs. Firestone to "public figure" status.

Within the latitude accorded in *Gertz*, in the case of a private individual, the negligence standard should be adopted to measure a publisher's liability in

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6.
Application for and administration of the bar examination are not matters of public record. To preserve the integrity of the admission process these matters of necessity must be closely guarded and uncompromised by public dissemination.

libel actions. The publisher of a libelous article should be liable to a defamed private individual for failure to exercise ordinary care prior to publication to determine the defamatory potential of its statements.

For these reasons, I would reverse and remand for further proceedings on the libel portion of appellant's complaint.

Harris, C.J., and Byrd, J., join in this dissent.

SUBSTITUTED MAJORITY OPINION

SUPREME COURT OF ARKANSAS

No. 78-10

Opinion Delivered 7/2/79

LOUIS ART DODRILL,
APPELLANT — Appeal from Pulaski Circuit Court, Warren E. Wood, Circuit Judge

vs.

ARKANSAS DEMOCRAT COMPANY, ET AL.
APPELLEES — Affirmed in part, Reversed in part.

P. H. HARDIN, Special Justice

OPINION

This appeal is prosecuted from an order of the lower court sustaining a motion for summary judgment, which dismissed Appellant's complaint seeking damages for libel and invasion of privacy. The factual background giving rise to the litigation is necessary to a clear disposition of the issues on appeal.

On February 4, 1975, upon a complaint filed by the Supreme Court Committee on Professional Conduct, the Pulaski Circuit Court entered judgment

suspending Louis Art Dodrill's license to practice law for a period of 12 months. The judgment conditioned the reinstatement of Dodrill's license thereafter only upon Dodrill's satisfactorily passing the regular examination for admission to the bar. No appeal from the judgment was taken by Dodrill, but he subsequently filed a petition in this court challenging the circuit court's power to condition the reinstatement of his license upon his taking and passing the regular bar examination for admission to the bar. We dismissed the petition holding that the circuit court acted within its jurisdiction. *See, In Re Dodrill*, 260 Ark. 223, 538 S.W.2d 549 (1976).

Thereafter, Dodrill took the regular bar examination administered August 9-11, 1976. The Board of Bar Examiners met in regular session and on August 21, 1976, announced the names of applicants who had passed the examination. The Secretary of the Board of Bar Examiners, in keeping with a long standing practice, provided a list of the names of the applicants who had passed the examination to the major newspapers in the state, namely, the *Arkansas Democrat* and the *Arkansas Gazette.*

The Sunday, August 22, 1976, issue of the *Arkansas Democrat* included an article which, among other things, stated:

SUSPENDED LR LAWYER FAILS BAR EXAMINATION

Louis Arthur Dodrill, a Little Rock lawyer whose license was suspended for a year on Feb. 4, 1975, for unethical conduct in his dealings with four clients, failed to pass the August examination of the State Board of Bar Examiners.

Following the above publication, Dodrill filed a petition for writ of mandamus in the Pulaski Circuit Court seeking an order directing the State Board of Bar Examiners to report his scores on the August, 1976, examination. The Board of Bar Examiners filed a motion to dismiss and on October 27, 1976, the *Arkansas Democrat*, in an article headlined "EXAM BOARD LAWYER ASKS SUIT DISMISSAL", recounted the efforts by the Board of Bar Examiners to have the suit dismissed, and a brief history of the controversy, including that Dodrill's name had not

been published along with the list of successful examinees. [1]

Being unsuccessful in the mandamus proceedings, Dodrill filed complaint against the members of the Board of Bar Examiners in the United States District Court seeking injunctive and other relief alleging, among other things, that the members of the Board of Examiners were responsible for the publication of the first above quoted article appearing in the *Arkansas Democrat.*

1.
The October 27, 1976 article stated:

> Robert L. Rogers II, a lawyer for the state Board of Law Examiners, has filed a motion in Pulaski Circuit Court asking Circuit Judge Tom F. Digby to dismiss a lawsuit filed by a suspended lawyer who wants to know his score on the Aug. 9 state bar examination.
>
> Louis Art Dodrill of 3000 Maryland Avenue filed the suit Oct. 5 asking Digby to force the state board to make public his score and to order the board to inform him whether he passed the examination.
>
> Dodrill did not appear at a hearing in the case last week, and Rogers' motion was the latest maneuver in a long controversy that dates back to Feb. 18, 1975.
>
> Digby ruled on that date that Dodrill's license to practice law would be suspended for one year because of unethical conduct in his dealings with four clients. The judge said Digby's [Dodrill's] license couldn't be reinstated until he passed the exam again.
>
> Dodrill missed the deadline for appealing Digby's ruling to the state Supreme Court, and the Supreme Court ruled on July 12 that the appeal had not been lodged in time.
>
> Dodrill then filed suit against the bar group seeking to determine his score.
>
> When the results of the Aug. 9 bar examination were made public, only those who passed the examination were listed. As a rule, the law examiners do not mention those who fail.

The affidavits, interrogatories and answers thereto, together with other factual materials properly before the trial court require the following findings: (1) that Dodrill, in fact, had passing scores upon the written examination administered by the Board of Bar Examiners in August of 1976; (2) that the Board of Bar Examiners declined to list his name among the applicants who successfully passed the examination at that time; (3) that Dodrill was not listed because the Board was continuing its investigation into Dodrill's conduct during the period of his suspension and to otherwise determine that he, in all respects, conformed to requirements of this court for admission to practice; and (4) that finally, on May 14, 1977, the Board of Bar Examiners certified Dodrill to be licensed, he having successfully passed the examination.

Following the reinstatement of his license, Dodrill filed his complaint in the court below seeking damages against the *Arkansas Democrat* for libel contained in the publication of the two articles above mentioned and for invasion of his right to privacy. In sustaining the *Arkansas Democrat's* motion for summary judgment dismissing Dodrill's complaint, the trial court found, *inter alia*, that Dodrill had gained the status of a "public figure" because of litigation and publicity surrounding his suspension from the practice of law; that the article complained of contained material of general and public concern, namely, requirements for admission to the bar and efforts for readmission to the bar by a previously suspended

lawyer; and that Dodrill had failed to demonstrate that the articles were published with actual malice.

We recognize as controlling the time-honored rule that a summary judgment is an extreme remedy. The burden is upon the moving party to demonstrate that there is no genuine issue of material fact for trial, and evidence submitted in support of the motion must be viewed most favorably to the party resisting the motion. *Gallman v. Carnes*, 254 Ark. 987, 497 S.W.2d 47 (1973); *Quillen, Adm'x v. Twin City Bank*, 253 Ark. 169, 485 S.W.2d 181 (1972).

A. *THE LIBEL CLAIM*

The central issue presented by this appeal is whether the court erred in finding Dodrill was a "public figure", thus affording the *Arkansas Democrat* First Amendment protection from an action for defamation in the absence of proof of actual malice as that doctrine has been announced by numerous decisions of the United States Supreme Court. *New York Times Company v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

Rosenbloom, supra, extended the privilege announced in *New York Times v. Sullivan, supra*, to publications concerning matters of general or public interest regardless of the plaintiff's status. However, the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323

(1974) repudiated *Rosenbloom* and held that the general rule announced there was inappropriate in those cases where the reputations of private individuals were placed in jeopardy.

In *Gertz*, the Court noted that public figures usually enjoy significantly greater access to channels of effective communication than private individuals. The Court reasoned that private individuals were more vulnerable because of lack of a forum to rebut false statements and that they were more deserving of recovery because they had not thrust themselves into the vortex of public controversy. The Court defined "public figures" as individuals who

> have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. *Id.* 345,

The definition of "public figure" is quite broad and, indeed, one may be held a public figure for limited purposes. Various courts have held included within the definition a football coach, [2] political activist, [3] wife of

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2.
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

3.
Associated Press v. Walker, 388 U.S. 130 (1967).

nationally known television celebrity, [4] editor of newspaper, [5] and a belly dancer. [6] The classification of "public figure" in these instances was justified by the particular facts of those cases. While all of the individuals who have been held to be public figures have not taken active parts in debates on public issues, they nevertheless remained persons in whom the public has a continuing interest in that in each instance the individual had taken affirmative steps to attract public attention or had strived to achieve some degree of public acclaim.

The most celebrated decision dealing with the question of public figure versus private individual is *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), which arose out of a libel action by the former wife of an heir of one of America's wealthiest industrial families. The Court rejected the publisher's contention that Mrs. Firestone was a public figure even though it appeared from the Court's opinion, both majority and dissent, that she was a fairly publicized individual who had held a few or several press conferences. The Court particularly pointed to its definition of "public figure" as defined in *Gertz* and concluded that Mrs. Firestone

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4.
Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976).

5.
Tait v. King Broadcasting Co., 1 Wash. App. 250, 460 P.2d 307 (1969).

6.
James v. Gannett Co., Inc., 40 N.Y.2d 415, 353 N.E.2d 834 (1976).

did not assume a role of especial prominence in the affairs of society and that she had not thrust herself to the forefront of any public controversy in order to influence its resolution.

The Court, in dealing with the publisher's contention that the Firestone divorce had been characterized by the Florida Supreme Court as a "cause celebre" and that it was a public controversy, observed:

> But in so doing Petitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom* . . . which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. *Id.* 454.

The Court concluded that a divorce is not the sort of public controversy referred to in *Gertz* even though the matrimonial difficulties of some individuals may be of interest to a portion of the reading public. The Court further observed that Mrs. Firestone did not freely choose to publicize the issues but was compelled to resort to the judicial process to obtain a release from the bonds of matrimony. "We have said that in such an instance '[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.'" *Id.* 454. The Court further found that Mrs.

Firestone had not assumed special prominence in the resolution of public questions and, therefore, held that she was not a public figure.

The record in the case at bar is devoid of facts supporting the lower court's finding that Dodrill had attained "public figure" status. He had not thrust himself into the vortex of public controversy and, in fact, any showing of a public controversy was absent. Moreover, he neither had taken steps to attract public attention, nor had he strived to achieve a degree of public acclaim. His activities were restricted to complying with the lawful mandate of the circuit court by applying for and taking the regular bar examination in August, 1976, an event in which the names of the applicants were not released for public dissemination. [7] Whether he passed or failed would no more relegate him to "public figure" status than did the representation of a client in a highly emotional and publicized case relegate Gertz to "public figure" status, or than did the widely publicized activities relegate the celebrated Mrs. Firestone to "public figure" status. We therefore hold that the lower court erred in granting the motion for summary judgment based on the record before it as to Appellant's cause of action for defamation.

For the guidance of the court below in any further proceedings, the limitations of *Gertz* must be

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7.
Application for and administration of the bar examination are not matters of public record. To preserve the integrity of the admission process these matters of necessity must be closely guarded and uncompromised by public dissemination.

observed. Recovery must be limited to actual damages. Punitive damages are precluded except for the showing of knowledge of falsity or a reckless disregard for the truth, and there cannot be liability without fault. Therefore, within the latitude accorded in *Gertz*, we hold that in the case of a private individual, the negligence standard shall measure the publisher's liability in libel actions. The publisher of a libelous article shall be liable to the defamed private individual for failure to exercise ordinary care prior to publication to determine the defamatory potential of its statements.

B. *THE INVASION OF PRIVACY CLAIM*

The invasion of privacy claim stands upon a different footing than the defamation claim. The law delineating conduct constituting an invasion of privacy and thus, an actionable wrong, is codified in RESTATEMENT (SECOND) OF TORTS, §652A (1977):

> (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
>
> (2) The right of privacy is invaded by
>
> (a) unreasonable intrusion upon the seclusion of another . . .
>
> (b) appropriation of the other's name or likeness . . .
>
> (c) unreasonable publicity given to the other's private life . . .

> (d) publicity that unreasonably places the other in a false light before the public . . .

In *Olin Mills, Inc. v. Dodd*, 234 Ark. 495, 353 S.W.2d 22 (1962) we recognized invasion of privacy [8] as an actionable wrong. *Olin Mills* involved conduct described in ¶2 (b) of the Restatement principles, while the instant case involves conduct allegedly violating ¶2 (d), as above set forth.

The right to recover for an invasion of privacy is conditioned upon the complaining party's demonstrating that (1) the false light in which he was placed by the publicity would be highly offensive to a reasonable person, and (2) that the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed. RESTATEMENT (SECOND) OF TORTS, §652E (1977).

A cause of action both for "false light" invasion of privacy and for defamation can be joined in the same

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8.
Neither the United States Constitution nor the Common Law recognized a cause of action for violation of the right to privacy as such. The concept stems primarily from Warren and Brandeis' *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). The late William L. Proser wrote extensively in this area. His work, *Privacy*, 48 Calif. L. Rev. 383, (1960) was in large measure the inspiration of the American Law Institute's principles noted above. The majority of jurisdictions now recognize the right to privacy and Arkansas has been included in that majority with the decision in *Olin Mills, supra. See also*, Note, *Torts—Invasion of Privacy by Publication of a Photograph*, 3 Ark. L. Rev. 105 (1948-49); Comment, *The Right of Privacy*, 6 Ark. L. Rev. 459 (1952); Comment, *Privacy: The Polygraph in Employment*, 30 Ark. L. Rev. 35 (1976).

action. *See, e.g., Varnish v. Best Medium Publishing Co.*, 405 F.2d 608 (2d Cir. 1968). However, there can be but one recovery for any particular publication. RESTATEMENT (SECOND) OF TORTS, §652E, Comment b. *See also*, 62 Am. Jur. 2d, *Privacy*, §5 (1972).

In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Supreme Court held that First Amendment protection precluded recovery upon a cause of action for "false light" invasion of privacy by a private individual against a publishing company in the absence of proof that the Defendant published the information with knowledge of its falsity or in reckless disregard of the truth. Thus, actual malice must be demonstrated by one seeking to recover for invasion of privacy. This requires a showing of more than mere negligence. There must be sufficient evidence to permit the conclusion that the defendant, in fact, entertained serious doubts as to the truth of his publication. In *Logan v. District of Columbia*, 447 F. Supp. 1328 (D. D.C. 1978), an action by a private individual for invasion of privacy, the court said:

> Finally, plaintiff's invasion of privacy claims as to the erroneous report that his urine test indicated drug usage must be considered. On this claim plaintiff appears to assert that the article invaded his privacy by placing him in a false light. To recover on such a theory, however, the plaintiff must demonstrate that the article was published with knowledge of its falsity or in reckless disregard of the truth—i.e.

> that it was published with actual malice. *Time, Inc. v. Hill*, 385 U.S. 374, 386-91, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967); *cf. Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 249-52, 95 S.Ct. 465, 42 L.Ed.2d 419 (1974). *Id.* 1333.

Where the Plaintiff is not a public figure and the publication is of matters of general or public concern, the rule laid down in *Time, Inc. v. Hill, supra*, dictates that a plaintiff must prove actual malice and that decision remains the law with respect to invasion of privacy actions. Later decisions of the Supreme Court which have retreated from the malice standard in private individual defamation actions have not eroded the rule of *Time, Inc. v. Hill, supra*, as to "false light" privacy actions. [9] The Plaintiff's burden of proof is governed by the clear and convincing evidence standard rather than by the preponderance of the evidence standard. *New York Times Co. v. Sullivan, supra*, 285-286; *Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 604 (D. D.C. 1977).

In the instant case, the affidavits and other matters properly before the court, clearly demonstrate that the *Arkansas Democrat* did not publish the articles in question with knowledge of falsity or in reckless disregard of the truth. There

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9. In *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), the Court consciously abstained from examining the status of *Time, Inc. v. Hill, supra*, in the light of *Gertz v. Welch, supra*. It is the duty of this court to follow the mandate of *Time, Inc. v. Hill* until the rule announced therein has been modified or overruled.

being therefore no genuine issues of any material fact with regard to the "false light" invasion of privacy claim, we affirm the trial court's action in entering summary judgment with regard to that cause of action.

Affirmed in part, reversed in part.

George Rose Smith, Holt, and Hickman, JJ, dissent.

SUBSTITUTED DISSENTING OPINION

SUPREME COURT OF ARKANSAS
No. 78-10

Opinion Delivered July 2, 1979

LOUIS ART DODRILL,
Appellant,

V.

ARKANSAS DEMOCRAT COMPANY, ET AL,
Appellees. Dissent on Petition for Rehearing.

DARRELL HICKMAN, *Associate Justice*

The majority, as it is reconstituted, has decided to take a restrictive approach to the problem presented in this case.

It now literally applies some language from United States Supreme Court decisions, notably the cases of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), and *Time Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1975). It also chooses to ignore some language from those cases and not apply that language I quoted from the *Gertz* case which recognizes that an individual can become a public figure for a "limited range of issues."

While the majority recognizes that a belly dancer and a football coach can be a public figure, it holds that a lawyer, whose license to hold a position of public trust is in issue, is not a public figure. Who, then, is a public figure? Apparently, aside from elected officials who are recognized by all of us as public figures, only notorious criminals or controversial figures of the highest order. It is regrettable the majority has elected to literally and restrictively apply the standard of law applicable. It is always easier to make such an application. It takes no flexibility, tolerance or ingenuity to do so. It is a haven often sought when tough decisions must be made. It is safer.

Whether Dodrill's status as a lawyer affects the majority I cannot say. He was not representing a client as was Gertz. He was not in litigation over a private personal matter as was Mrs. Firestone. He was, as we said in our original opinion, in the public eye because of his breach of a public trust. Would a physician, seeking return of his license after losing it for improperly authorizing drugs, become a public figure? Would a

druggist become a public figure under the same circumstances? Such individuals, like Dodrill, would not be ordinary professional people minding their own business, practicing their trade, unwittingly subject to the glare of publicity. They would be individuals who had violated their public trust because of their own misdeeds and were, for good or ill, about to resume their roles as individuals having a public trust. The public in every such instance has a right to know about such a situation and that is a consideration that must be given when deciding such cases.

What right or need does the public have to know about the goings on of a belly dancer or a football coach? Less, I dare say, than about a lawyer whose license has been suspended for unethical conduct.

Finally, and most importantly, the effect of the majority's decision is to limit the First Amendment of the United States Constitution. That is the substantive issue before us. Any limitation of the freedoms contained in that Amendment, for whatever good intentions, should be made only after careful consideration of the consequences. Any limitations, against whomever, for whatever reasons, cut across everyone's right (with some limitations, of course) to say what he pleases, about whom he pleases—an American tradition that no other nation has enjoyed nor any government permitted. It is a freedom that ought to be preserved and it is limited in Arkansas by the majority's decision to grant a rehearing in this case.

I respectfully dissent from this decision and would deny the petition for rehearing.

I am authorized to state that George Rose Smith and Holt, JJ. join in this dissent.

ORDER OF THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS GRANTING SUMMARY JUDGMENT

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS

LOUIS ART DODRILL — PLAINTIFF

VS. — No. 77-2533

ARKANSAS DEMOCRAT COMPANY and LITTLE ROCK NEWSPAPERS, INC. — DEFENDANTS

ORDER

On October 4, 1977, a hearing in this case was held on the separate Motions for Summary Judgment filed by defendants Arkansas Democrat Company and Little Rock Newspapers, Inc., the plaintiff being present pro se, defendant Arkansas Democrat Company being present by its attorneys Barber, McCaskill, Amsler & Jones by Austin McCaskill, Sr., and defendant Little Rock Newspapers, Inc., being present by its attorneys, Wright, Lindsey & Jennings

by H. William Allen, and the Court, upon consideration of the motions, the public documents, briefs and affidavits attached thereto, the brief and affidavit filed by the plaintiff, the pleadings, discovery and statements of counsel, finds the following facts:

1. The defendant Arkansas Democrat Company sold the *Arkansas Democrat* newspaper to defendant Little Rock Newspapers, Inc., on March 15, 1974, prior to the publication in that newspaper of the articles complained of by the plaintiff and Arkanas Democrat Company has had no connection with the *Arkansas Democrat* since the sale.

2. The plaintiff, as a lawyer and because of the litigation and attendant publicity surrounding and following his suspension from the practice of law on February 18, 1975, was, at the time of the publication of the articles complained of, a public figure.

3. The articles complained of concerned matters of public and general concern, namely, the requirements for admission to the bar of this State and the efforts for readmission to the bar by a previously suspended lawyer.

4. Defendant Little Rock Newspapers, Inc., made a reasonable investigation prior to the publication of the articles complained of, and it had a rational basis for believing the articles to be true.

5. The plaintiff has filed another suit which is currently pending in the United States District Court for the Eastern District of Arkansas, Western Division, Louis Art Dodrill, plaintiff,

vs. Robert W. Henry, *et al.* (Arkansas State Board of Law Examiners), defendants, docket number LR-C-77-113, in which the plaintiff states in his complaint, *inter alia*, that the defendants in that case "are responsible for the item appearing in the August 22, 1976, edition of the *Arkansas Democrat* stating that the plaintiff had failed the bar examination" and that those defendants "have failed to notify said newspaper."

6. The plaintiff in this proceeding has failed to demonstrate with any proof that the articles complained of were published by defendant Little Rock Newspapers, Inc., with actual malice; *i.e.*, with knowledge of falsity or with a reckless disregard of falsity.

And the Court finds further that, viewing the evidence most favorable to the plaintiff, the plaintiff has failed to present any genuine issue as to any of these material facts in support of the allegations in his complaint of libel and invasion of privacy, and the Court makes the following conclusions of law:

1. That the failure of the plaintiff to demonstrate some connection of defendant Arkansas Democrat Company to the publication of the articles complained of affords no legal basis for recovery against that defendant.

2. That the First Amendment to the United States Constitution protects defendant Little Rock Newspapers, Inc., from recovery by the plaintiff due to the plaintiff's failure to raise a genuine issue of fact that the articles complained of were published by that defendant with actual malice.

IT IS THEREFORE ORDERED AND ADJUDGED that the separate motions for summary judgment filed by the defendants Arkansas Democrat Company and Little Rock Newspapers, Inc., are hereby granted, and judgment is awarded the defendants on the plaintiff's complaint and for their costs, this _____ day of October, 1977.

/s/ Warren Wood
CIRCUIT JUDGE

Oct. 17, 1977

Supreme Court, U. S.
FILED
JAN 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

No. 79-873

Little Rock Newspapers, Inc. ..... *Petitioner*

v.

Louis Art Dodrill ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF ARKANSAS

RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION

Petitioner requests certiorari for the purpose of deciding that a professional who has lost his license to practice is a public figure and to correct supposed errors in the decision of the court below. Respondent respectfully requests that the Court deny the petition.

The statement of facts made by petitioner is not clear. Rather than restate the facts, which are clearly set out by the Arkansas Supreme Court at A-24 to 29 of the appendix, respondent would adopt the statement there.

REASONS FOR DENYING THE WRIT

1. Whether a disbarred attorney is a public figure for the limited range of issues surrounding his attempts to gain readmission to the bar?

The question as stated actually raises two somewhat interrelated points:

> (A) Is a professional a public figure if he or she has lost their license, attempts to regain it, and fails, and
> (B) Does the supposed public controversy over lawyers qualifications extend to the apparently unsuccessful efforts of a disbarred attorney to regain his license.

With respect to the issuance of the writ, these questions must be answered negatively.

(A) The first point, which can be squared with neither the facts of this case nor the broader policy issues it raises, must be answered negatively for two reasons: it would make all professionals public figures; and prior decisions of this Court mandate this result.

Petitioner's proposition, if adopted, would certainly make all lawyers, if not all profesisonals, public figures for the limited purpose of publicity concerning their unsuccessful attempts to regain their license after being disciplined. This is too much.

While the public may be entitled to know if a disciplined professional has regained his license, what possible public function is served by reports that the public need not fear the unsuccessful, except perhaps, humiliation.

Petitioner argues that the public at large needs reassurance "that it is protected against the unscrupulous and incompetent at the bar" [1] Petition at 7. Of course, a decision of this Court approving such reports would serve to make all similarly situated professionals subject to like publicity.

Respondent, like any disciplined professional seeking to regain his or her license, [2] if unsuccessful, represents no danger to the public, their competence or scruples of no consequence, since the danger lies in the very thing they have not attained—a professional license to practice before the public. [3]

If the public is to be protected, the obvious question is: Protected from what?

1.
This mantle of public service is a curious one for the teller of falsehoods to don.

2.
The petition at page 8 claims that there were news reports of respondent's lawsuit in the Supreme Court of Arkansas, which challenged the authority of the trial court to require him to take a bar examination. Not only is this claim outside the present record and irrelevant to his public figure status months later, the claim is, the evidence will show, false.

3.
Even if certiorari were granted to consider the narrow facts of this case, petitioner's contention could only be: *False* reports that a disbarred lawyer has been unsuccessful in regaining his license are entitled to constitutional protection under the First Amendment because the media feels the public should know it is protected from such persons.

Furthermore, prior decisions of this Court clearly indicate that respondent is not a public figure, not even for the limited issue of his apparently unsuccessful efforts to regain his license.

While petitioner conceeds at page 7 of the petition that not all lawyers are public figures, *Gertz v. Robert Welch*, 418 U.S. 323 (1974), it nevertheless urges the court to grant certiorari to consider that all disciplined non-lawyers are.

However, no decision of this court—certainly not *Gertz*—would indicate such a conclusion. Not even the discredited *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), would reach so far as to permit the publication of negative, [4] false reports, which bootstrap their object to public figure status.

In fact, if petitioner's reasoning were adopted, it would fully—if not more expansively—reinstate *Rosenbloom*, which the Court has recently refused to do, *Hutchsison v. Proxmire*, _____U.S._____, 99 S.Ct. 2675, 2688 (1979) and *Wolston v. Reader's Digest Ass'n., Inc.*, _____U.S. _____, 99 S.Ct. 2701, 2708 (1979).

Moreover, this Court's decision in *Time v. Firestone*, 424 U.S. 448 (1976) is dispositive of the type of false publicity here sought to be constitutionally protected.

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4. Negative in the sense that these reports were really non-news. Of course, even if they were newsworthy, respondent is not "automatically transformed into a public figure," *Wolston*, 99 S.Ct. at 2708.

Thus, the first report—suspended lawyers fails bar—was a false report of a private, non-public record, and not constitutionally protected under *Firestone*. The second, which was a report of a judicial proceeding, repeating the original libel and adding that respondent did not attend, is also not deserving or protection under the holding of *Firestone*, since the mere fact that a judicial proceeding was underway did not automatically create a public issue, not did it automatically make respondent a public figure.

(B) Petitioner next argues that there is a public controversy over the qualifications and discipline of lawyers, and that this controversy is so pervasive that it encompasses a disbarred lawyer's apparently unsuccessful attempt to regain his license.

With respect to the issuance of the writ, this effort must fail.

In the first place, even assuming that there is a public *concern* over the qualifications of lawyers and disciplinary actions taken against them, this concern does not equate in all instances with public controversy.

Whatever legitimate public interest may be served by public debate over the standards for admission to the bar, or for practicing attorneys, they dissipate when the interest turns to those particular individuals who cannot satisfy the former. In this instance, the public interest can at best be characterized as concern.

Mere concern does not equal controversy, as this Court has recognized in every case since *Gertz, supra.*

Even assuming that there is a public controversy over the qualifications of lawyers, it cannot be seriously said that this controversy reaches those who are not.

Furthermore, it is quite doubtful that the public's concern over lawyers, overrides the privacy rights of the individual, or society's (or a state's) own interest in keeping the examination process confidential.

Accordingly, the Arkansas State Board of Law Examiners has never revealed the names of those who sit for an examination. Thus, the Arkansas court stated:

> Application for and administration of the bar examination are not matters of public record. To preserve the integrity of the admission process these matters of necessity must be closely guarded and uncompromised by public dissemination. *Dodrill v. Little Rock Newspapers, Inc.*, 265 Ark. 628, n. 7 at A-33.

Thus, even assuming that there is a public controversy over the qualifications of lawyers, [5] it does not reach those who are not; and the material reported here cannot be said to be matter of controversy, since they are private according to state custom.

2. Whether the Arkansas court too narrowly, and unconstitutionally defined the concept of public figures?

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5. Respondent does not complain of any reports concerning the publicity surrounding his disbarment.

Here petitioner asks the Court to grant the writ to correct a supposed error on the part of the lower court. Because no such error exists, the writ should not issue.

Petitioner's argument is based on two misapprehensions of the lower court's decision.

First, petitioner asserts that the court *held* that the public must have a continuing interest a person before he or she could be deemed a public figure. The quotation relied upon for this assertion (A-31) is taken out of context, since upon examination it is clearly a comment on what other cases have held, not a holding itself.

Second is the claim that the lower court drew the definition of "public figure" too narrowly, and that this overly restrictive definition is unconstitutional. In fact, the court below did not attempt a definition of public figure, apart from quotations from decisions of this Court and illustrations from other state courts.

Such a definition was unnecessary in view of the court's finding that no controversy was one shown:

> The record in the case at bar is devoid of facts supporting the lower court's finding that Dodrill had attained "public figure" status. He had not thrust himself into the vortex of public controversy and, in fact, *any showing of public controversy was absent. Dodrill v. Little Rock Newspapers, Inc.*, 265 Ark. 628 (1979) (A-33 of petitioner's appendix, emphasis supplied).

Accordingly, since there was no controversy, there was no need for a definition of whether, or by what process

respondent, or any other professional, could become an involuntary public figure.

Therefore, the writ should not issue to consider the question of unconstitutionally narrow definitions, since no definition was attempted and would not have been germane.

CONCLUSION

Therefore, since there was no public controvesy, since respondent was not a public figure in any event, and because the petition does not raise any questions of importance or significance, the petition should be denied.

Respectfully submitted,

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